LIAN KEOW SDN. BHD.

v.

CHELLIAH PARAMJOTHY & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOF ABDUL RASHID J
[CIVIL SUIT NO. 270 OF 1981]
6 FEBRUARY 1982

CIVIL PROCEDURE: *Striking out claim - Application by 2nd defendants to strike out statement of claim against them - Order 18 r. 19 RHC and under inherent jurisdiction of Court - Grounds of application - Statement of claim discloses no reasonable cause of action against 2nd defendants, frivolous and vexatious and an abuse of the process of the Court - Issue of indefeasibility of title raised by 2nd defendants - Cause of action founded in equity and trust - Power to dismiss action summarily without permitting plaintiffs to proceed to trial - Principles applicable - Whether 2nd defendants necessary party to action.*

TRUSTS: *A person who receives trust property - Whether he takes it subject to trust if he has actual or constructive notice of trust interest - Plaintiffs through Official Receiver applied for declaration - 1st defendant held land in trust for plaintiffs - 1st defendant charged land to 2nd defendants to secure repayment of loan - 1st defendant authorised 2nd defendants to enter into possession of land - Section 271 National Land Code - A person receives trust property which he knows or ought to know is inconsistent with terms of trust - Whether accountable to beneficiary under trust - Stranger to trust - Liable to beneficiary if he allows himself to be used as an instrument of a breach of trust.*

LAND LAW: *Indefeasibility of title - Section 340(2) or (3) National Land Code - Whether could be defeated "by operation of law" - Section 340(4)(b) - Defence of bona fide chargees for valuable consideration without notice of trust - Whether this defence will avail under s. 340(4)(b).*

In this case, the plaintiffs through the Official Receiver filed a writ applying for a declaration that the 1st defendant was holding land held under Grant 6705 Lot 2084 in the Mukim of Tebrau in the District of Johore Bahru in trust for the plaintiffs. It was alleged that the 2nd defendants knew or ought to have known that the said land was vested in the 1st defendant as trustee and in breach of trust the defendant on or about 22 May 1976 wrongfully charged the said land to the 2nd defendants to secure the repayment of a loan of RM120,000 allegedly granted by the 2nd defendants to the 1st defendant and/or his wife. Also, that on or about 14 August 1976 the 1st defendant wrongfully and in breach of trust authorised the 2nd defendants to enter into possession of the said land under s. 271 of the National Land Code 1965. It was also alleged that the 2nd defendants have neither accounted nor paid to the plaintiffs as required under s. 274 of the Code all sums actually received by the 2nd defendants or for any additional sums which they might reasonably have been expected to receive by the prudent exercise of their powers.

However, the 2nd defendants applied to the Court to set aside the statement of claim which was against them under O. 18 r. 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the Court. The application was made on the ground that the statement of claim discloses no reasonable cause of action against them, is frivolous and vexatious and is an abuse of the process of the Court.

Held:

[1] The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power which should only be exercised with utmost caution and the Court, in determining whether there is a reasonable cause of action or that the plaintiff could not possibly succeed, shall submit the evidence deposed in affidavits to critical examination. Should there arise questions of law that were sufficiently arguable, it would be justified for the Court to allow the action to proceed to trial.

[2] On reading the affidavits of the 2nd defendants and the plaintiffs filed herein, it is plain that there exist issues which are disputed in that the 2nd defendants raised the issue of interest which is indefeasible under the National Land Code whereas the cause of action of the plaintiffs were founded in equity and trust and cannot be disposed of on affidavit evidence.

[3] It is not plain and obvious that the plaintiffs' claim against the 2nd defendants could not possibly succeed and since the cause of action relied on by the plaintiffs against the 2nd defendants is founded on the determination of the interest of the 2nd defendants under s. 340(4)(b) of the National Land Code there arise questions of law that are sufficiently arguable. Consequently it is necessary that the action should be allowed to proceed to trial.

[4] Indefeasibility of title could not only be defeated on a charge of fraud, misrepresentation, forgery or void instrument, but may also be defeated "by operation of law" under s. 340(4)(b) of the National Land Code. Should the plaintiffs succeed under this proviso of sub-section (4)(b) of s. 340 of the Code the defence that the 2nd defendants are *bona fide* chargees for valuable consideration without notice of the trust will not avail as it is only applicable in circumstances provided under sub-sections (2) and (3) of s. 340 of the Code and not under sub-section (4) thereof.

[5] As the instant case is a case in equity founded on breach of trust, it is trite law that in equity a person who receives trust property takes it subject to the trust if he has actual or constructive notice of the trust interest and that a person who receives trust property which he knows or ought to know is inconsistent with the terms of the trust, is accountable to the beneficiary under that trust. A stranger may be held liable to the beneficiary of a trust if he dishonestly allows himself to be used as an instrument of a breach of trust.

[6] As the 2nd defendants have been allowed to enter possession of the said land, the plaintiffs have a cause of action against the 2nd defendants to render accounts of any receipts enjoyed by the 2nd defendants. In the circumstances, the 2nd defendants are a necessary party to this action.

[2nd defendants application dismissed with costs.]

Cases referred to:

Tractors Malaysia Bhd. v. Tio Chee Hing [1975] 2 MLJ 1
Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 MLJ 224
Loke Yew v. Port Swettenham Rubber Company Ltd. [1913] AC 491
Dan Sin Wah v. Chan Hai Swee [1951] MLJ 109

Legislation referred:

National Land Code 1965, ss. 271, 274, 340(2), (3), (4)(b)
Rules of the High Court 1980, O. 18 r. 19

For the plaintiffs - T. Thomas; M/s. Skrine & Co.
For the 2nd defendants - R.R. Sethu; M/s. Azman, Davidson & Co.

[**Editors Note:** The Appeal by the 2nd defendants to the Federal Court *vide* Civil Appeal No. 54 of 1982 was dismissed on 7 March 1983 **(Coram: Salleh Abas CJ Malaya, Wan Suleiman FJ and George Seah FJ)**]

JUDGMENT

Mohd. Yusof Abdul Rashid J:

The second defendants move the Court for an order to set aside the statement of claim so far as it affects them. The application is made under O. 18 r. 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the Court on the ground that the statement of claim discloses no reasonable cause of action against them, is frivolous and vexatious and is an abuse of the process of the Court.

One, Kay Chek Lit, the executive director/manager of the second defendants deposed in the supporting affidavit that at the request of the first defendant, the second defendants had granted a loan of RM120,000 to the first defendant's wife. As security for the repayment of the loan, the first defendant executed a charge over the land held under Grant 6705 Lot 2084 in the Mukim of Tebrau in the District of Johore Bahru ("the said land"). The second defendants were not aware that the said land belonged to the plaintiffs since the said land was registered in the name of the first defendant as the beneficial owner and not as a trustee. Further, there existed no trust caveat on the register document of title of the said land.

The second defendants contend that even assuming that the contents of the plaintiffs' statement of claim are true, there is no cause of action disclosed against the second defendants on the ground that the second defendants are *bona fide* chargees for valuable consideration without notice and the interests acquired by the second defendants are indefeasible. The second defendants were not and no allegation appears in the statement of claim that the second defendants were a party to any fraud.

Now, the plaintiffs through the Official Receiver of Malaysia who has been appointed by the Court as the Liquidator of the plaintiffs which are in the process of being wound-up, filed a writ applying for a declaration that the first defendant is holding the said land in trust for the plaintiffs. Several orders are also sought one of which is for an order that the charge in relation to the said land in favour of the second defendants be set aside or alternatively for an order that the first defendant shall pay the sum due to the second defendants to satisfy the charge.

The statement of claim discloses that the plaintiffs and the second defendants were at all material times members of the Mosbert Group of Companies ("the Mosbert group") and controlled by one Mr. Amos William Dawe. The first defendant is an advocate and solicitor practising in Johore Bahru and at all material times acted as a legal adviser to Dawe and companies within the Mosbert group including the plaintiffs and the second defendants. The first defendant is holding the said land as trustee for the plaintiffs. At all material times the second defendants knew or ought to have known that the said land was vested in the first defendant as trustee. In breach of trust the first defendant on or about 22 May 1976 wrongfully charged the said land to the second defendants to secure the repayment of a loan of RM120,000 allegedly granted by the second defendants to the first defendant and/or his wife. On or about 14 August 1976 the first defendant wrongfully and in breach of trust authorised the second defendants to enter into possession of the said land under s. 271 of the National Land Code 1965. The second defendants have neither accounted nor paid to the plaintiffs as required under s. 274 of the Code all sums actually received by the second defendants or for any additional sums which they might reasonably have been expected to receive by the prudent exercise of their powers.

In reply to the affidavit filed by the second defendants, the Official Receiver Malaysia deposed in an affidavit that until the plaintiffs were ordered to be wound-up by the Court on 11 March 1979, the plaintiffs were a company within the Mosbert group controlled by one Amos William Dawe ("Dawe"). Investigations reveal that Dawe being "the moving spirit and principal officer of the Mosbert group of companies" had instructed the first defendant who was one of the legal advisers to the Mosbert group to hold certain lands as trustee for certain companies in the Mosbert group and the said land was one of those pieces of land. The first defendant had deposed in an affidavit confirming the said facts. In the said affidavit the first defendant evinced that on the instruction of Dawe, he agreed to be a trustee for certain immovable properties in the Mukim of Pulai, Johore which were in fact beneficially owned by the plaintiffs. Further, the first defendant stated that he did not pay the purchase price for these properties. The first defendant on 23 April 1980 had admitted to one, Mr. P.C. Dawson, the Assistant Registrar General in the Official Receiver's Office in Hong Kong that he was holding the said land in trust for the benefit of an unnamed company in the Mosbert group. The records of the plaintiffs disclose that the plaintiffs are the beneficial owners of the said land.

In relation to the second defendants the Official Receiver, Malaysia attaches to his affidavit an affidavit deposed by the first defendant filed in Johore Bahru Civil Suit No. 100 of 1980 in which the first defendant and second defendants are parties thereto. The first defendant stated in the affidavit that the second defendants had put financial pressure on him and he was tricked into signing loan papers for an alleged loan of RM120,000 but neither he nor his wife had received any money. In that event, the first defendant had denied that the second defendants had made any loan to him or to his wife for which the said land had been charged as security for the repayment thereof. The plaintiffs had alleged in the statement of claim that the second defendants were one of the companies in the Mosbert group under the control of Dawe. Knowledge regarding the first defendant being the trustee in relation to the said land is to be imported from the knowledge of Dawe, the first defendant who was the second defendants' legal adviser and the close connection between the various companies in the Mosbert group.

Reading the affidavits filed by the second defendants and the plaintiffs, it is plain that there exist issues which are disputed and cannot be disposed of on affidavit evidence. Whilst the second defendants raised the issue of interest which is indefeasible under the National Land Code the cause of action of the plaintiffs are founded in equity and trust.

In dealing with an application for a summary dismissal of an action in the instant case the Privy Council in the case of *Tractors Malaysia Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1 held

> The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution. Had the mater depended upon the contents of the statement of claim alone, their Lordships would have been loath to differ from the opinion of the Federal Court that, despite imperfections in drafting (which however might have been capable of cure by amendment) the statement of claim, at any rate as respects some of the claims to alternative relief, did raise questions of law that were sufficiently arguable to justify proceeding to trial. In refusing to submit the evidence to critical examination, however, the Federal Court erred in law. This makes it necessary for their Lordships to state briefly the facts disclosed by the evidence which, in their view, lead to the conclusion that the New Action could not possibly succeed.

From the above opinion, the following propositions of law may be deduced:

(a) the power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power which should only be exercised with the utmost caution;

(b) to determine whether there is a reasonable cause of action or that the plaintiff could not possibly succeed, the Court shall submit the evidence deposed in affidavits to critical examination; and

(c) should there arise questions of law that were sufficiently arguable, it would be justified for the Court to allow the action to proceed to trial.

From the plaintiffs' statement of claim and the affidavits filed, it is plain that the claim is a claim in equity and not in tort or contract. In so far as the first defendant is concerned, I am satisfied that the evidence, if true, manifestly shows that he is holding the said land in trust for the plaintiffs. Next to be decided is whether the second defendants' charge is subject to such trust. It is to be noted that para. 8 of Kay Chek Lit's affidavit deposed on 19 September 1981 alleges that assuming that the contents of the plaintiffs' statement of claim are true, there is no cause of action disclosed against the second defendants as the second defendants are *bona fide* chargees for valuable consideration without notice and their interest is indefeasible. It is also contended that the statement of claim makes no allegation of fraud.

Evidently the second defendants raise the question regarding the indefeasibility of title which, according to the second defendants, could only be defeated on a charge of fraud, misrepresentation, forgery or void instrument. This is not so, for, indefeasibility may also be defeated "by operation of law" under s. 340(4)(b) of the National Land Code 1965 ("the Code"). As pointed out, the plaintiffs do not rely on any of those grounds set out under s. 340(2) or (3) of the Code to defeat the indefeasible interest of the second defendants as the registered chargees but found their action on the breach of trust committed by the first defendant with the second defendants actively assisting with knowledge of the existence of such trust. Gill FJ (as he then was) in his speech in the Federal Court case of *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] 1 MLJ 224 at p. 232 said:

> The term "operation of law" in sub-section (vi), as Das on Torrens System in Malaya points out at p. 235, is a generic term deliberately used by the Legislature to grant relief in cases where contractual or conscientious obligations (importing a breach of duty to which equity has attached its sanction) are undertaken by or imposed on the registered proprietor either at law or in equity ...
>
> [Note: subsection (vi) referred to in the speech refers to sub-section (vi) of s. 42 of the FMS Land Code the provisions of which were substantially the same as sub-section (4)(b) of s. 340 of the Code].

Should the plaintiffs succeed in raising the issue that the interest acquired by the second defendants may be determined by "operation of law", the second defendants will not be able to find any shield by claiming that they are the *bona fide* chargees for valuable consideration without notice of the trust, for, such a defence may only be raised founded on the proviso to sub-section (3) of s. 340 of the Code. Such proviso is only applicable in circumstances provided under sub-sections (2) and (3) of s. 340 of the Code and not under subsection (4) thereof. Lord Moulton in delivering the judgement of the Privy Council in the case of *Loke Yew v. Port Swettenham Rubber Company Ltd.* [1913] AC 491 at p. 504 said:

> Indeed the duty of the Court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of the registration if the register be not rectified. Take for example the simple case of an agent who has purchased land on behalf of his principal but has taken the conveyance in his own name, and in virtue thereof claims to be the owner of the land whereas in truth he is a bare trustee for his principal. The Court can order him to do his duty just as much in a country where registration is compulsory as in any other country, and if that duty includes fresh entries in the register or the correction of existing entries it can order the necessary acts to be done accordingly.

Now, the authorities cited by the learned counsel for the second defendants relate to attempts to defeat the principle of indefeasibility of title and interest on the ground of fraud and had nothing to do with an action founded on breach of trust. A local case decided by Briggs J in *Dan Sin Wah v. Chan Hai Swee* [1951] MLJ 109 may be of some assistance. The facts were:

> On 26 May 1945 by an agreement in writing one Chan Hock Choon sold an undivided half-share of a trust property to the plaintiff who knew that the property was so held in trust that no Court order was first obtained authorising the disposal of the said trust property. On 29 December 1945, Chan Hock Choon died. On 13 July 1950, the plaintiff, purporting to act as an attorney of Chan Hock Choon, by virtue of an irrevocable power of attorney, registered under the Land Code, executed a transfer of the trust property to himself personally, and on 24 July 1950, that transfer was registered.

Briggs J expressed the following opinion:

> Section 161 of the Land Code enables persons to become proprietors, free from equities, of land which was registered in the name of the former proprietor "as trustee", in the absence of express notice of trust. It does so by absolving them from what would otherwise be their duty in equity, by reason of the constructive notice given by the words "as trustee", on the register, to enquire into the existence and nature of the potential trust. Even if the trust instrument is deposited and so can be referred to without difficulty, the situation is the same in the absence of a caveat to protect the trust: there is no duty to enquire and a failure to enquire cannot endanger the purchaser's title. It is nowhere stated, however, in s. 161 or elsewhere in the Land Code that a purchaser is entitled to override beneficial rights of infant *cestuis que trustent* of which he has express notice. In this case there was wilful and deliberate participation in a breach of trust, well known to be such by both parties. It is observable that the only person who could reasonably have been expected to impose a caveat to protect the trust was Chan Hock Choon, who later broke it. I think the weight of authority of the reported cases, which are admittedly not easy to reconcile, is against the plaintiff.

In the instant case, on the assumption that the second defendants knew that the said land was held by the first defendant in trust for the plaintiffs, "there was wilful and deliberate participation in a breach of trust, well known to be such by both parties." In the result the second defendants' indefeasible interest in the said land may be determined under s. 340(4)(b) of the National Land Code. In my judgment a stranger may be held liable to the beneficiary of a trust if he dishonestly allows himself to be used as an instrument of a breach of trust.

Even if the second defendants attempt to shield behind the contention that they are the *bona fide* chargees for valuable consideration without notice, the allegation against them is that they are not *bona fide* chargees for valuable consideration. The plaintiffs rely on the affidavit evidence deposed by the first defendant and filed in Johore Bahru Civil Action No. 100 of 1980 to the effect that-

> I at first refused but Overseas Credit Finance (M) Berhad were putting financial pressure on me personally over an alleged loan RM120,000 to my wife where loan papers had been signed but by a trick neither my wife nor I had received any money.

If what the first defendant had stated is true, then the second defendants had not lent the said RM120,000 to the first defendant or to his wife in which event the charge would become unenforceable for lack of consideration.

In a counter-affidavit, Kay Check Lit, deposing on behalf of the second defendants denied the above allegations and contended that the allegation of the first defendant was untrue. In the result, the question regarding the enforceability of the charge becomes an issue which

may only be disposed of after hearing further evidence on oath and the probability of the existence of such fact might well depend heavily on the credibility of witnesses giving evidence on oath.

Nothing turns on the contention of the second defendants that the first defendant is not registered "as trustee" on the register document of title of the said land or that there was no trust caveat entered by the plaintiffs to protect their interest in the said land. Such failure does not in any way affect the trust created in favour of the plaintiffs, who are not required by the National Land Code to take any such step so as to render the trust valid, though the plaintiffs are vested with a discretion to do so.

Be that as it may, in my judgment, it is not plain and obvious that the plaintiffs' claim against the second defendants could not possibly succeed and since the cause of action relied on by the plaintiffs against the second defendants is founded on the determination of the interest of the second defendants under s. 340(4)(b) of the National Land Code, to my mind, there arise questions of law that are sufficiently arguable. In the result, it is necessary that the action should be allowed to proceed to trial.

On the other hand, the plaintiffs are claiming alternative reliefs too. The plaintiffs seek to require the first defendant to satisfy the charge so that the said land may be transferred to the plaintiffs unencumbered. In addition, since it is alleged that the first defendant had on 14 August 1976 wrongfully allowed the second defendants to enter into possession of the said land under s. 271 of the National Land Code, the second defendants are under a duty to account under s. 274 of the Code. The orders sought, in my view, are not inconsistent with the principle of indefeasibility of title protected under the Code. In fact in this instance, the plaintiffs are not challenging the indefeasible interest acquired, if they had indeed acquired it, by the second defendants. In the Federal Court case of *Ong Chat Pang & Anor. v. Valliappa Chettiar* cited earlier, Gill FJ (as he then was) at p. 230 said:

> Unregistered interests in land may be recognised as interests in land, whenever in doing so they do not do violence to the principles and purposes of the Code, where the intention is to establish one estate in land only so as to ensure protection to *bona fide* purchasers for valuable consideration or decide priorities in the case of competing equities ...

As stated earlier, the instant case is a case in equity founded on breach of trust. It is trite law that in equity a person who receives trust property takes it subject to the trust if he has actual or constructive notice of the trust interest and that a person who receives trust property which he knows or ought to know is inconsistent with the terms of the trust, is accountable to the beneficiary under that trust.

Equity is concerned to give effect to equitable interests, though bereft of legal ownership. Thus, it will trace trust property into the hands of a stranger, where it is not inequitable to do so, and will hold a purchaser for valuable consideration liable as a constructive trustee if he had actual or constructive notice that the transfer to him was of trust property in breach of trust.

It is to be noted that the plaintiffs require the first defendant to transfer the said land to them free from any encumbrance.

The Privy Council in the case of *Loke Yew v. Port Swettenham Rubber Company Ltd.,* cited earlier, was of the view that:

> Now, it is clear that a *cestui que trust* has the right to require a trustee who is a bare trustee for him of land to register that land in his name, seeing that he is the sole beneficial owner and that the trustee has no interest therein.

At the least, the interest of the second defendants will be affected by the judgment of the Court. If in fact the second defendants had entered possession of the said land knowing that the said land was of trust property in breach of trust, there is a cause of action against the second defendants at the instance of the plaintiffs as beneficiary under the trust. The fact that the second defendants were chargees for valuable consideration will not prevent them from being constructive trustees and are thus accountable to the plaintiffs.

It will indeed save time and costs if the second defendants are made party to this proceedings since the Court will be in a position to determine the exact amount due under the charge and a judgment by the Court for the first defendant to pay the amount due may be made in one and the same action. The plaintiffs being entitled to be vested with the title to the said land will succeed in obtaining a Court order requiring the first defendant to execute the requisite transfer. However, the proprietorship of the said land will be subject to the charge in favour of the second defendants and if the second defendants were not a party to this action, the second defendants will not be bound by the Court order. In the event that the first defendant had committed a breach which confers the right on the second defendants to foreclose the charge, the second defendants may insist on exercising the right to foreclose.

Having obtained the order prayed for against the first defendant, the plaintiffs may require the first defendant to render account of any benefit or rents which the first defendant might have received from the said land while he was the trustee thereof. In this case, however, it is the second defendants who had been allowed to enter possession of the said land. Hence, the plaintiffs have a cause of action against the second defendants to render accounts of any receipts enjoyed by the second defendants. In the circumstances the second defendants are a necessary party to this action.

Application dismissed with costs.

Also found at [1988] 1 CLJ 57